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NEW YORK LIFE INSURANCE AND ANNUITY

12 CORPORATION and NYLIFE SECURITIES LLC

13 **UNITED STATES DISTRICT COURT**

14 **CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION**

15 ERIC B. FROMER CHIROPRACTIC,
INC., a California corporation,
16 individually and as the representative of
a class of similarly-situated persons,

17 Plaintiff,

18 vs.

19 NEW YORK LIFE INSURANCE AND
20 ANNUITY CORPORATION, NYLIFE
SECURITIES LLC and JOHN DOES
21 1-10,

22 Defendants.

Case No. 2:15-cv-04767 AB (JCx)
Hon. Andre Birotte, Jr.
Ctm. 4 – Spring Street

CLASS ACTION

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS OR, IN THE
ALTERNATIVE, MOTION TO
STAY OR, IN THE ALTERNATIVE,
MOTION TO STRIKE CLASS
DEFINITION**

Date: September 28, 2015
Time: 10:00 a.m.
Ctm.: 4

Action Filed: June 24, 2015
Trial Date: None Set

PLEASE TAKE NOTICE that, on September 28, at 10:00 a.m., or as soon thereafter as the matter may be heard in the above-entitled Court, located at 312 N Spring St, Los Angeles, CA 90012, Defendants New York Life Insurance and Annuity Corporation (“NY Life & Annuity”) and NYLife Securities LLC (“NYLife Securities”) (collectively, “Defendants”) will and hereby do move, pursuant Rule 12(b)(6), 12(b)(1), and 12(f), to dismiss, or in the alternative, to stay this action. In the event the action is not dismissed, the Court should strike the class action allegations (paragraphs 19-26, Prayer for Relief paras. A, C) pursuant to Rules 12(f) and 23(d)(1)(D).

This motion is made on the grounds that (1) the case should be dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, as Plaintiff’s claims are moot and Plaintiff lacks Article III Standing, or (2) the case should be stayed pending rulings from the U.S. Supreme Court in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014) cert. granted, No. 14 857, 135 S.Ct. 2311 (U.S. May 18, 2015) and *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014) cert. granted, 135 S.Ct. 1892 (U.S. Apr. 27, 2015) that bear directly on two issues fundamental to this case. In the alternative, (3) the case should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Finally, (4) the Court should strike the class action allegations (paragraphs 19-26, Prayer for Relief paras. A, C) definition under Rules 12(f) and 23(d)(1)(D) because the class definition set forth at para. 19 is unascertainable as a practical matter and constitutes an improper fail-safe class definition.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities and the Declaration of Scott J. Hyman, the Complaint, and all other papers on file in this action.

This motion is made following the conferences of counsel pursuant to L.R. 7-3 which took place on July 14 through 16, 2015 and August 20, 2015.

1 DATED: August 20, 2015

SEVERSON & WERSON
A Professional Corporation

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4 By: /s/ Scott J. Hyman
5 SCOTT J. HYMAN

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8 SUTHERLAND ASBILL & BRENNAN, LLP

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11 By: /s/ Lewis S. Weiner
12 LEWIS S. WIENER, *admitted pro hac vice*

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